Re CHOP YEW SEONG; *Ex parte* SRI SUNDARI PALAYAKAT CO.

[O.Bk.J. (Rigby J.) January 27, 1958]

[Penang — Bankruptcy No. 36 of 1957]

Partnership — Retirement of partner — Notice of dissolution to Registrar of Business Names only — No notification of retirement to creditors and public by advertisement or otherwise.

Bankruptcy — Jurisdiction of Court to hear petition — Act of bankruptcy — Cannot be committed through agent or co-partner.

When a known partner retires, or a partnership is dissolved, notice of that fact must be given to the world at large by advertisement, and to old customers by some special communication. An old customer is entitled to a more specific notice than a person who never dealt with the firm at all; and in considering whether notice of dissolution or retirement is or is not sufficient, a distinction must be made according as the person sought to be effected by notice was or was not a customer of the old firm. A mere notice to the Registrar of Business Names is not sufficient.

An act of bankruptcy must be a personal act or default of the debtor, and cannot be committed through an agent of the person sought to be made bankrupt, if such person is not cognizant of, or has not authorised, the said act.

Whilst a Court sitting in Penang has jurisdiction to hear a petition in bankruptcy on grounds of practical convenience — including the administrations of the bankrupt's state by the Official Assignee — although the act of bankruptcy was committed elsewhere in the Federation of Malaya, it is generally desirable that section 4 (2) of the Bankruptcy (Transitional Provisions) Ordinance 1946 should be complied with and the petition presented "to the Court in the State in which the debtor has resided or carry on business for the longest period during the 6 months immediately preceding the presentation of the petition."

In re E.M. Abdullah & Co.[2] and *In re K. Mohamed Ibrahim & Co.*[3] followed.

Cases referred to:—

(1) *Tan Boon Cheo v. Ho Hong Bank Ltd.*, (1934) M.L.J. 180.

(2) *In re E. M. Abdullah & Co.*, (1938) M.L.J. 130; (1938) S.S.L.R. 193.

(3) *In re K. Mohamed Ibrahim & Co.*, (1940) M.L.J. 90.

(4) *Re Leong Cheong & Co.*, (1930) S.S.L.R. 155.

BANKRUPTCY PETITION.

S. Thillaimuthu for petitioning creditors.

Lee Saik Kee for Yeow Par Seong.

Cur. Adv. Vult.

Rigby, J.: — This is a bankruptcy petition presented by Messrs. Sri Sundari Palayakat Co. against the firm of Chop Yew Seong alleging that the said Chop Yew Seong are indebted to them in the sum of $7,342 and that the said firm committed an act of bankruptcy within the meaning of section 4(1)(j) of the Federated Malay States Bankruptcy Enactment by giving a written Notice dated the 16th May, 1957, to their creditors that the said firm was about to suspend payment of its debts.

The debtor firm carried on business in Sungei Patani, Kedah, and the alleged partners of that firm resided in Kedah. Whilst it is true that this Court, sitting in Penang, has jurisdiction to hear this petition, I have already expressed the view, to which I adhere, that on grounds of practical convenience — including the administration of the bankrupt's estate by the Official Assignee — it is generally desirable that section 4(2) of the Bankruptcy (Transitional Provisions) Ordinance, 1946, should be complied with and the petition presented "to the Court in the State in which the debtor has resided or carried on business for the longest period during the six months immediately preceding the presentation of the petition".

So far as the debtor firm itself was concerned the petition presented no difficulty and a Receiving Order was made against the debtor firm by this Court on the 8th July, 1957.

The petition, however, was also served on one Yeow Par Seong, as being a partner in the firm, and these proceedings are only concerned with the opposition entered by Yeow Par Seong, whom I will hereafter refer to as the respondent. That opposition is based on the contention that as from the 1st October, 1956, the respondent had retired from the firm and that the debts relevant to these proceedings were incurred by the debtor Company between the 17th December, 1956, and the 15th April, 1957.

The petitioning creditors seek to justify their action as against the respondent by production of a certified true copy of the particulars furnished to the Registrar of Businesses under the Registration and Licensing of Businesses Ordinance (No. 12 of 1953). That Ordinance has, of course, now been repealed by the Registration of Businesses Ordinance, (No. 47 of 1956), but for the purposes of these proceedings

the repealed Ordinance is the relevant Ordinance. In the particulars submitted to the Registrar of Businesses by the debtor firm, in compliance with the express provisions of the Ordinance itself, the names of the partners in the debtor firm are stated as:

"1. Yeow Yew Ming; 2. Yeow Yew Wah; 3. Yeow Teoh Seong; 4. Yeow Par Seong."

The date of that certified copy is shown as the 8th June, 1957. Mr. Thillaimuthu, for the petitioning creditors, quite rightly relied upon that certificate as *prima facie* evidence that all the persons shown therein, including, of course, the respondent, were partners in the debtor firm at the date of the alleged act of bankruptcy, namely, the 16th May, 1957. The respondent sought to rebut that presumption that he was a partner in the debtor firm at the time of the act of bankruptcy by producing in evidence a copy of a letter dated the 4th October, 1956, addressed to the Registrar of Businesses, Kuala Lumpur, which reads as follows:—

" Business Registration No. 44704.

Dear Sir,

We have the honour to inform you that we are no longer the sharing partners of Chop Yew Seong, 22, Jalan Dewa, Sungei Patani, Kedah as from the 1st October, 1956.

As regarding the future registration of the above Chop, please delete our names in the record of Registry.

Thanking you in anticipation."

That letter is then signed by:—

" Yeow Yew Ming, Nric No. K. 119124, Yeow Teoh Seong, Nric No. K. 116457, and Yeow Par Seong, Nric No. KM. 117613 of 22, Jalan Dewa, Sungei Patani, Kedah."

Postage of a letter dated the 4th October, 1956, addressed to the Registrar of Businesses, Kuala Lumpur, is supported by a registered postal receipt with the Post Office chop dated the 4th October, 1956, upon it. The respondent himself, who is, in fact, the son of Yeow Yew Wah, said to be the sole continuing partner, gave evidence in support of the circumstances in which that original letter was allegedly written. He admitted that no acknowledgment of the receipt of that letter had been received from the Registrar of Businesses, but said that he assumed that the contents of the letter had been approved. He said that he himself had worked only until 1953 in the shop in which the debtor firm carried on business and that thereafter he had set up business on his own. His evidence as to the despatch of that letter to the Registrar of Businesses, allegedly notifying him of the dissolution of the partnership and the continuance of the firm by Yeow Yew Wah alone seems to be corroborated both by Yeow Yew Meng, one of the retiring partners, and by Yeow Yew Wah, the alleged continuing partner, the latter of whom said that the dissolution was with his knowledge and consent. It would, no doubt, have been far more satisfactory if some evidence had been called on behalf of the respondent from the office of the Registrar of Businesses as to the receipt of this letter. However, I see no reason to disbelieve the testimony of the respondent and his witnesses that there was, in fact, an intention between them that the partnership should be dissolved and that Yeow Yew Wah, the respondent's father, should continue as the sole partner in this firm. But whatever may have been the intention of the partners as between themselves as to their retirement from the firm and the continuance by Yeow Yew Wah as the sole partner, what then was the position of those who continued to deal with the firm without knowledge of any alteration in its status? It is clear to the outside world that the partners remained as shown in the particulars of the business registered with the Registrar of Businesses, and persons dealing with the firm were entitled to act upon the assumption that those particulars were correct unless and until they received express notice to the contrary. The position is stated in the case of *Tan Boon Cheo v. Ho Hong Bank, Ltd.*[1] In that case the Court held — and I quote the headnote:—

" An advertisement in three local Chinese newspapers of the dissolution of a partnership is not *per se* sufficient notice to those having had dealings with the firm who have not actually seen it although they may be regular subscribers to the newspapers; but to fix them with knowledge of the fact so as to prevent them holding a retiring partner liable for debts incurred after retirement, express notice must be given."

The position in law is set out by Prichard, J., in which he quotes the following passage from *Lindley* on Partnership, 9th edition, page 291:—

" When a dormant partner retires, he need give no notice of his retirement in order to free himself from liability in respect of acts done after his retirement. The reason is that, as he was never known to be a partner, no one can have relied on his connection with the firm, or truly allege that, when dealing with the firm, he continued to rely on the fact that the dormant partner was still connected therewith.

But when an apparent partner retires, or when a partnership between several known partners is dissolved,

the case is very different; for then those who dealt with the firm before a change took place are entitled to assume that no change has occurred until they have notice to the contrary. And even those who never had dealings with the firm, and who only knew of its existence by repute, are entitled to assume that it still exists until something is done to notify publicly that it exists no longer. An old customer, however, is entitled to a more specific notice than a person who never dealt with the firm at all; and in considering whether notice of dissolution or retirement is or is not sufficient, a distinction must be made according as the person sought to be affected by notice was or was not a customer of the old firm.

When a known partner retires, or a partnership is dissolved, notice of the fact is usually given to the world at large by advertisement, and to old customers by some special communication.

Public notice given by advertisement in the 'Gazette' is sufficient, not only against all who can be shown to have seen it, but also as against all who had no dealings with the old firm, whether they saw it or not."

There was evidence in this case, which I accept, that the petitioning creditors had had dealings with the debtor firm for some years prior to the 1st October, 1956, being the date on which the partners, as between themselves, decided to dissolve the partnership. In the absence of any alteration in the particulars of that partnership as registered, persons — and particularly old customers such as the petitioning creditors — were entitled to accept and to act upon those particulars of registration as correct until they received express notice to the contrary. There is no evidence nor, indeed, any suggestion, in this case that the petitioning creditors were notified by the debtor firm of any alteration in the status of the firm or of the retirement of any of the partners. I am, therefore, of the opinion, and I so hold, that the respondent is estopped from denying that he was a partner at the time of the alleged act of bankruptcy on the 16th May, 1957.

The only point remaining for consideration is whether the written Notice dated the 16th May, 1957, issued to the creditors over the rubber stamp impression bearing the name of the firm Chop Yew Seong can be regarded as an act of bankruptcy committed by the respondent. The law in this matter is well established. An act of bankruptcy must be a personal act or default of the debtor, and cannot be committed through an agent of the person sought to be made bankrupt, if such person is not cognizant of, or has not authorised, the said act. (See the cases of *E.M. Abdullah & Co.*[2] and *In re K. Mohamed Ibrahim & Co.*[3]). Mr. Thillaimuthu has sought to distinguish these two cases by pointing out that in both cases it was sought to render liable partners resident out of the jurisdiction, to wit, in India, for acts of bankruptcy committed by their co-partners within the jurisdiction. That is, of course, true, but, I think, purely incidental. The dominant consideration is that the act of bankruptcy is a personal act or default and cannot be committed through an agent or co-partner without the authorization or cognizance of the other partners. Mr. Thillaimuthu relying on the *dicta* of Sproule, J. in *Re Leong Cheong & Co.*,[4] submitted that if the act — in this case the sending of the letter — is shown to be an act performed in the ordinary course of the business of the firm and, therefore, *prima facie*, the act of the firm, then it is for an objecting co-partner to show that he was not responsible for, or is to be dissociated from, that particular act or omission. I accept that as a correct statement of the law. But applying that test in this case, even allowing for the relationship of a father and son, I think that the respondent has sufficiently discharged the onus of showing that he was not responsible for, or associated with that act of bankruptcy. I have found as a fact that although there was an agreement as between the partners to dissolve the partnership and that the letter dated the 4th October, 1956, was written in pursuance and in furtherance of that agreement, no notice of that dissolution or retirement from the partnership was expressly given to the petitioning creditors and, therefore, the respondent is estopped from denying that he was a partner at the time of the act of bankruptcy upon which the petition is based. But on the facts of the case I am not satisfied that that letter was sent upon the authority, or even with the cognizance, of the respondent. It is clear from the facts, which I accept, that he had ceased working in the business in 1953 and set up his own shop, unlike his uncle, Yeow Yew Meng, who continued to work in the debtor firm's shop after the despatch of that letter dated the 4th October, 1956. No suggestion is made by, or on behalf of, the petitioning creditors that the respondent was associated with, or seen in, or had anything to do with, the debtor firm's business at any time after 1953.

I hold, therefore, that the act of bankruptcy was founded on a document issued without the authority or cognizance of the respondent. The petition against him for a Receiving Order and an Adjudication Order must accordingly be dismissed with costs.

Order accordingly.

Solicitors: *S. Thillaimuthu; Pillai, Lim, Lee & Hwang.*

LEE AH CHEONG v. REG.

[C.C.A. (Whyatt C.J., Tan Ah Tah and Wee Chong Jin JJ.) May 21, 1958]

[Singapore — Criminal Appeal No. 1 of 1958]

Criminal Law and Procedure — Jury — Special jury — Summoning of, without Judge's order — Criminal Procedure Code (Cap.132), s.180 — Whether Judge's overruling counsel's objection amounts to order for trial by special jury — Judge's decision in order to avoid delay — Whether in such circumstances proceedings were mistrial or nullity.

Criminal Law and Procedure — Practice — Joinder of charges — Capital charge should not be coupled with non-capital charges.

This was an appeal against conviction and sentence of the appellant on the offences of abduction and using a firearm with intent to cause physical injury. One of the grounds of appeal was that the jury which tried his case was not summoned according to law. The circumstances in which the jury was summoned were: A few days prior to the trial counsel for the Crown made an oral request to the Sheriff for a special jury to be summoned to try the case. At the trial, after appellant's pleas of not guilty had been recorded, the learned trial Judge directed the jury to be sworn whereupon counsel for the appellant interposed and objected that the Crown had not obtained a Judge's order for a special jury under section 180 of the Criminal Procedure Code. After a brief discussion between the Judge and counsel, the objection was over-ruled and the special jury was empanelled and in due course they returned a verdict of guilty on both charges.

The shorthand note of the proceedings at the trial showed that the learned Judge decided in the way he did, not because he considered it just and reasonable to order a special jury to be summoned to try the case, but because the summoning of a new jury would involve delay and it had not been shown that the appellant would not have a fair trial if he were tried by a special jury.

Held: the special jurors in this case were unqualified because they were not summoned in accordance with the statutory provisions of the Criminal Procedure Code, and therefore, there was a mistrial and the proceedings were a nullity.

Order a *venire de novo.*

Counsel for the appellant referred to the rule of practice in England that a capital charge should not, generally speaking, be coupled with non-capital charges in the same indictment. The reason for this rule is that when an accused person is defending himself on a capital charge, he ought not, in fairness, to be required to defend himself on other additional charges at the same trial.

Held: the English rule of practice has long been established and it is desirable that it should be followed in these Courts.

Case referred to:—

(1) *R. v. Solomon,* (1957) 3 W.L.R. 915; 42 Cr.App.R. 9.

COURT OF CRIMINAL APPEAL.

David Marshall for the appellant.

T. A. Mahony (Crown Counsel) for the respondent.

The judgment of the Court was delivered by —

Whyatt C.J.: — The appellant was convicted at the January Assizes of the offences of abduction and using a firearm with intent to cause physical injury and sentenced to death. He appeals against his conviction and sentence on a number of grounds, in particular, on the ground that the jury which tried his case was not summoned according to law and consequently the proceedings were a mistrial and a nullity.

The circumstances in which the jury was summoned may be briefly stated. A few days prior to the trial, counsel for the Crown made an oral request to the Sheriff — whether by telephone or in person is not clear — for a special jury to be summoned to try this case and in compliance with this request, the Sheriff caused a panel of special jurors to attend in Court on the day of the trial. After the appellant's pleas of not guilty had been recorded, the learned Judge directed the jury to be sworn whereupon counsel for the appellant interposed and objected that the Crown had not obtained a Judge's order for a special jury under section 180 of the Criminal Procedure Code and consequently there was no authority for a special jury to be sworn to try this case. Counsel for the Crown replied that it was not the practice, when a special jury was required to try a case,